



**REPUBLIC OF KENYA**

**High Court at Embu**

**Civil Case 40 of 2012**

**DAVID MURIMI MURIUKI.....1<sup>ST</sup> PLAINTIFF**

**PETER MURIITHI MURIUKI .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MWATHI KABA.....1<sup>ST</sup> DEFENDANT**

**JUSTIN MURIUKI.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is the Notice of Motion dated 16/3/2012 brought under Order 40 Rule 1 and 2 of the Civil Procedure Rules seeking a temporary injunction against the 1<sup>st</sup> Defendant preventing him either by himself, his agents, and/or servants or anyone acting through him from selling, alienating, disposing, wasting, leasing, charging land parcel No. NGARIAMA/THIRIKWA/50 pending the hearing and determination of the suit herein.

The grounds appear on the face of the application. It is supported by the affidavit of the 1<sup>st</sup> Plaintiff. He states that the 2<sup>nd</sup> Defendant is his father and a son to the 1<sup>st</sup> Defendant. And so the 1<sup>st</sup> Defendant is his paternal grandfather. He further state that the 1<sup>st</sup> Defendant has shared out his land to his 2 wives who have in turn shared out to their children. The 2<sup>nd</sup> Defendant being one of the children has been allocated 2 acres. But he has refused to share out these 2 acres to the plaintiffs and others.

Hence the application. The 1<sup>st</sup> Defendant/Respondent filed a replying affidavit opposing the application. He is the registered owner of the land in issue but has not subdivided his land. He acknowledges the Plaintiffs/Applicants as his grandchildren. The Defendants/Respondents have also raised a preliminary objection citing 4 grounds.

They say there is no cause of action raised in the plaint filed herein. They further say the Plaintiffs/Applicants have not disclosed that there have been other cases involving them deliberated on by the Land District Tribunal and the Embu High Court.

It was agreed that both parties argue both the application and preliminary objection be argued simultaneously. Both counsels have filed their respective submissions. I will first deal with the preliminary objection.

Ground 4 of the preliminary objection has no basis. The averment talked about is made in the Plaint and not in a verifying affidavit. Paragraph 13 of the plaint dated 16/3/2011 and filed on the same date makes that averment that there have been other suits between the parties.

The Plaintiffs claim is that the 2<sup>nd</sup> Defendant who is their father is holding land given to him by the 1st Defendant (their grandfather) in trust for them. The holder of the title to this land is the 1<sup>st</sup> Defendant. If any orders were to be made concerning this land he would be affected. Does a trust exist? That is the issue this Court must establish. Evidence must be led for the Court to determine if equitable or customary law rights exist. It is not an issue that can dispose of by way of a preliminary objection. The suit cannot therefore be said to be misconceived/frivolous.

I find no merit in the preliminary objection which I dismiss with costs.

The next issue is the application for a temporary injunction. The Plaintiffs are claiming land from their father who is the 2<sup>nd</sup> Defendant. The person who has title to this land is the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant says he has not distributed his land to anyone though he acknowledges the plaintiffs as his grandchildren. He further says the Plaintiffs have been settled by their mother on some land and so they are not destitutes.

The order of temporary injunction they seek is against the 1<sup>st</sup> Defendant/Respondent. The 2<sup>nd</sup> Defendant/Respondent has no registered interest in the land. It is him they say has refused to give them land which he has received from his father (1<sup>st</sup> Defendant). Their claim is on an unidentified portion/share of the land NGARIAMA/THIRIKWA/50. And I think it is for that reason that they have not sought these orders against him.

Their claim for a share is not from the 1<sup>st</sup> Defendant/Respondent who is their grand father. But because he is the registered owner of the land where their father has a share, they would wish to have him injuncted. The 1<sup>st</sup> Defendant/Respondent was registered as proprietor under the now repealed Registered Land Act. His rights were therefore covered by Section 27 and 28 of the said Act.

From the ***GIELLA VS CASSMAN BROWN [1973] EA 358*** case, an applicant seeking the granting of an injunction must establish a *prima facie* case with chances of success. It would only in very unusual circumstance to stop a registered owner of land from using his/her land. The Plaintiffs/Applicants are not in occupation and neither are they utilizing the land in issue.

The 1<sup>st</sup> Defendant/Respondent has every right to enjoy his rights under his title as proprietor. I do find that they have failed to establish the 1<sup>st</sup> principle. They will also not suffer any loss as they are not in occupation. I therefore find that their application seeking an injunction must fail.

I also dismiss it with costs.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 7<sup>TH</sup> OF NOVEMBER 2012.**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of:-**

**Nganga for Ms. Wangechi for Plaintiff/Applicant**

**Ms. Muthike for Mwai for Defendant/Respondent**

**Njue CC**